A

Datuk Seri Anwar bin Ibrahim v Mohd Khairul Azam bin Abdul Aziz and another appeal

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-01(IM)(NCVC)-479–09 OF 2020 AND W-01(IM)(NCVC)-486–09 OF 2020

HAS ZANAH MEHAT, MOHD SOFIAN AND LEE HENG CHEONG JJCA

C

9 JANUARY 2023

Civil procedure — Striking out — Appeal — Appeal against High Court's decision in dismissing appellants' applications to strike out respondent's claim — Respondent sought to obtain declaration on validity of full pardon granted to the first appellant — Whether respondent had cause of action — Whether respondent had locus standi — Whether it was open for court to examine advice of Pardons Board of Wilayah Persekutuan Constitutional Law — Prerogative of mercy — Clemency — Full pardon granted to first appellant — Whether powers of clemency of Yang di-Pertuan Agong encompassed both conviction and sentence — Whether clemency process and royal prerogative of mercy were justiciable — Federal Constitution art 42

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Constitutional Law — Prerogative of mercy — Clemency — Full pardon granted to first appellant — Whether powers of clemency of Yang di-Pertuan Agong encompassed both conviction and sentence — Whether clemency process and royal prerogative of mercy were justiciable — Federal Constitution art 42

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These appeals were heard jointly as they related to the same decision of the learned High Court judge ('HCJ'). In the High Court, the respondent commenced an action by writ against Datuk Seri Anwar bin Ibrahim as the appellant in Appeal 479 ('the first appellant') and the Pardons Board of Wilayah Persekutuan as the appellant in Appeal 486 ('the second appellant') seeking the following declarations: (a) that the second appellant that convened and advised the Yang di-Pertuan Agong ('YDPA') in respect of the full pardon granted to the first appellant ('the pardon') was not properly constituted rendering the said sitting and advice given by the second appellant null and void ab initio; (b) that the pardon granted was invalid, null and void; (c) alternatively, that the effect of the pardon was limited to the sentencing only and did not set aside the conviction made against the first appellant. The first appellant was charged for an offence under s 377B of the Penal Code and was convicted and sentenced to five years' imprisonment term. On 16 May 2018, the first appellant received the pardon. The first and second appellants filed

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separate applications to strike out the respondent's claim under O 18 r 19 of the Rules of Court 2012. The learned HCJ dismissed both the striking out applications. Hence, these appeals by both of the appellants. The first appellant contended that: (i) the clemency process and the royal prerogative of mercy were non-justiciable; (ii) the respondent had no locus standi to bring and maintain the action; (iii) the respondent had no cause of action; (iv) the respondent who had no interest in the subject matter of the declarations sought was not entitled to seek the relief claimed; and (v) the respondent's action was an abuse of process and ought to be struck out. The second appellant in turn contended that the respondent's action was frivolous and vexatious and an abuse of the court's process.

Held, allowing the appeals:

(1) The respondent had no interest in the subject matter of the declarations, ie the pardon granted or some rights against the appellants. Similarly, the respondent had no cause of action against the second appellant. The respondent's claim did not disclose a cause of action against the first appellant and/or the second appellant. The respondent had not pleaded any infringement of private or public rights or interest or special injury resulting from the pardon granted to the first appellant. The respondent was clearly a busy body, a troublemaker and was not entitled to the declarations sought. Simply being a Malaysian citizen and a lawyer did not accord him the requisite right to bring this frivolous suit. It was clearly an abuse of court process and ought to have been struck out (see paras 17–19).

(2) There was nothing in art 42 of the Federal Constitution ('the FC') which curtailed or limited the powers of the YDPA to grant the pardon to the first appellant. The plain words of the relevant article of the FC did not exclude the granting of a pardon in respect of a conviction. Article 42 of the FC showed that the powers of mercy and clemency of the YDPA were extensive and encompassed both conviction and sentence. Under reg 113 of the Prisons Regulations 2000, a person who had been convicted had the right to petition the YDPA for a pardon against conviction and sentence. Further, arts 48(1) and 25(1)(c) of the FC referred to a 'free pardon' (see paras 21–23).

(3) The learned HCJ erred in finding that the respondent had the necessary locus standi merely by virtue of being a member of the public and a lawyer. The clemency process and the granting of the pardon to the first appellant did not in way or manner affect the respondent's personal or legal or any rights or interests. Thus, the respondent had no standing or right to question the clemency process or the advice given to the YDPA or the granting of the pardon to the first appellant. For the respondent to find an action such as this, he must demonstrate that he had suffered

some special damage by the granting of the pardon and that he had a genuine private interest to protect. The respondent had failed wholly in this respect. Accordingly, he had no locus standi to challenge the pardon granted to the first appellant (see paras 26, 28 & 30).

(4) The learned HCJ clearly erred and misdirected himself in holding that there was an issue to be tried as to the correctness of advice given by the second appellant and whether there was a written opinion given by the Attorney General ('AG'). The learned HCJ blatantly ignored the pertinent and binding decisions of the Federal Court and Supreme Court that held that it was not open for the court to examine the advice of the Pardons Board, the matter being non-justiciable. Moreover, the respondent had no knowledge of the advice. Thus, there was no basis for the respondent to contend that such advice was wrong. Article 42(9) of the FC did not make it mandatory for the AG to render a written opinion. As such the learned HCJ assumed erroneously that there was no written opinion and that it did not support the pardon. There was no basis for this erroneous assumption and in any event, that was not the respondent's pleaded case. Thus, it was not an issue to be tried (see paras 31 & 34).

(5) The HCJ was clearly wrong to ignore the doctrine of stare decisis. There was no reason and basis for him to depart from the long line of established binding precedents. The power to grant pardons could only be exercised by the YDPA personally and exclusively and such exercise was not justiciable. The respondent had failed to plead any averments in the respondent's pleading or affidavit nor was any evidence adduced that in granting the pardon to the first appellant, the YDPA acted beyond his statutory powers or in bad faith. Thus, there was no basis to impugn the pardon granted and no reasons for the learned HCJ to make the findings he did (see paras 46 & 48–49).

[Bahasa Malaysia summary

Rayuan-rayuan ini didengar bersama kerana ia berkaitan dengan keputusan hakim Mahkamah Tinggi ('HMT') yang bijaksana yang sama. Di Mahkamah Tinggi, responden memulakan tindakan secara writ terhadap Datuk Seri Anwar bin Ibrahim sebagai perayu dalam Rayuan 479 ('perayu pertama') dan Lembaga Pengampunan Wilayah Persekutuan sebagai perayu dalam Rayuan 486 ('perayu kedua') memohon pengisytiharan berikut: (a) bahawa perayu kedua yang memanggil dan menasihati Yang di-Pertuan Agong ('YDPA') berkenaan dengan pengampunan penuh yang diberikan kepada perayu pertama ('pengampunan') tidak ditubuhkan dengan betul menyebabkan persidangan tersebut dan nasihat diberikan oleh perayu kedua batal dan tidak sah ab initio; (b) bahawa pengampunan yang diberikan adalah tidak mengikut undang-undang, batal dan tidak sah; (c) sebagai alternatif, bahawa kesan pengampunan itu terhad kepada hukuman sahaja dan tidak mengenepikan

sabitan yang dibuat terhadap perayu pertama. Perayu pertama didakwa atas kesalahan di bawah s 377B Kanun Keseksaan dan telah disabitkan kesalahan dan dijatuhkan hukuman penjara lima tahun. Pada 16 Mei 2018, perayu pertama menerima pengampunan. Perayu pertama dan kedua memfailkan permohonan berasingan untuk membatalkan tuntutan responden di bawah A 18 k 19 Kaedah-Kaedah Mahkamah 2012. HMT yang bijaksana menolak kedua-dua permohonan pembatalan tersebut. Oleh itu, rayuan ini oleh kedua-dua perayu. Perayu pertama berhujah bahawa: (i) proses pengampunan dan prerogatif belas kasihan diraja tidak boleh diadili; (ii) responden tidak mempunyai locus standi untuk membawa dan mengekalkan tindakan itu; (iii) responden tidak mempunyai kausa tindakan; (iv) responden yang tidak mempunyai kepentingan dalam hal perkara perisytiharan yang dipohon tidak berhak untuk mendapatkan relif yang dituntut; dan (v) tindakan responden adalah satu penyalahgunaan proses dan patut dibatalkan. Perayu kedua pula berhujah bahawa tindakan responden adalah remeh dan menyusahkan serta menyalahgunakan proses mahkamah.

Diputuskan, membenarkan rayuan-rayuan:

(1) Responden tidak mempunyai kepentingan dalam hal perkara pengisytiharan, iaitu pengampunan yang diberikan atau beberapa hak terhadap perayu. Begitu juga, responden tidak mempunyai kausa tindakan terhadap perayu kedua. Tuntutan responden tidak mendedahkan kausa tindakan terhadap perayu pertama dan/atau perayu kedua. Responden tidak memplid apa-apa pelanggaran hak persendirian atau awam atau kepentingan atau kecederaan khas akibat pengampunan yang diberikan kepada perayu pertama. Responden jelas merupakan penyibuk, pengganggu dan tidak berhak menerima pengisytiharan yang dipohon. Semata-mata merupakan warganegara Malaysia dan seorang peguam tidak memberikannya hak yang diperlukan untuk membawa saman remeh ini. Ia jelas merupakan penyalahgunaan proses mahkamah dan sepatutnya dibatalkan (lihat perenggan 17–19).

(2) Tiada apa-apa dalam perkara 42 Perlembagaan Persekutuan ('PP') yang menyekat atau mengehadkan kuasa YDPA untuk memberikan pengampunan kepada perayu pertama. Kata-kata jelas perkara berkaitan PP tidak mengecualikan pemberian pengampunan berkenaan dengan sabitan. Perkara 42 PP menunjukkan bahawa kuasa belas kasihan dan pengampunan YDPA adalah luas dan merangkumi kedua-dua sabitan dan hukuman. Di bawah peraturan 113 Peraturan Penjara 2000, seseorang yang telah disabitkan mempunyai hak untuk membuat petisyen kepada YDPA untuk mendapatkan pengampunan terhadap sabitan dan hukuman. Selanjutnya, perkara 48(1) dan 25(1)(c) PP merujuk kepada 'pengampunan bebas' (lihat perenggan 21–23).

(3) HMT yang bijaksana telah terkhilaf apabila mendapati responden

A mempunyai locus standi yang diperlukan semata-mata kerana menjadi orang awam dan seorang peguam. Proses pengampunan dan pemberian pengampunan kepada perayu pertama tidak dengan cara atau kaedah menjejaskan peribadi atau undang-undang responden atau mana-mana hak atau kepentingan. Oleh itu, responden tidak mempunyai pendirian B atau hak untuk mempersoalkan proses pengampunan atau nasihat yang diberikan kepada YDPA atau pemberian pengampunan kepada perayu pertama. Bagi responden mendapati tindakan seperti ini, dia mesti menunjukkan bahawa dia telah mengalami beberapa kerosakan khas dengan pemberian pengampunan dan bahawa dia mempunyai C kepentingan peribadi sebenar untuk dilindungi. Responden telah gagal sepenuhnya dalam hal ini. Sehubungan itu, dia tidak mempunyai locus standi untuk mencabar pengampunan yang diberikan kepada perayu pertama (lihat perenggan 26, 28 & 30).

D (4) HMT yang bijaksana jelas terkhilaf dan tersalah arah dengan menyatakan bahawa terdapat isu yang perlu dibicarakan tentang ketepatan nasihat yang diberikan oleh perayu kedua dan sama ada terdapat pendapat bertulis yang diberikan oleh Peguam Negara ('PN'). E HMT yang bijaksana secara terang-terangan mengabaikan keputusan yang berkaitan dan mengikat Mahkamah Persekutuan dan Mahkamah Agung yang berpendapat bahawa ia tidak terbuka untuk mahkamah meneliti nasihat Lembaga Pengampunan, perkara itu tidak boleh diadili. Selain itu, responden tidak mempunyai pengetahuan tentang nasihat F tersebut. Oleh itu, tiada asas untuk responden berhujah bahawa nasihat tersebut adalah salah. Perkara 42(9) PP tidak mewajibkan PN untuk memberikan pendapat bertulis. Oleh itu, HMT yang bijaksana telah terkhilaf membuat andaian bahawa tidak ada pendapat bertulis dan ia tidak menyokong pengampunan itu. Tidak ada asas untuk andaian yang G salah ini dan dalam apa jua keadaan, ia bukan kes yang diplidkan oleh responden. Oleh itu, ia bukan satu isu untuk dibicarakan (lihat perenggan 31 & 34).

(5) HMT jelas salah untuk mengabaikan doktrin stare decisis. Tidak ada sebab dan asas baginya untuk meninggalkan preseden yang mengikat H yang telah ditetapkan. Kuasa untuk memberikan pengampunan hanya boleh dilaksanakan oleh YDPA secara peribadi dan eksklusif dan pelaksanaan tersebut tidak boleh diadili. Responden telah gagal untuk memplid sebarang pengesahan dalam pliding atau afidavit responden dan tiada sebarang bukti yang dikemukakan bahawa dalam memberikan I pengampunan kepada perayu pertama, YDPA bertindak di luar kuasa statutorinya atau dengan niat jahat. Oleh itu, tiada asas untuk menafikan pengampunan yang diberikan dan tiada alasan untuk HMT yang bijaksana membuat penemuan yang dibuat (lihat perenggan 46 & 48–49).]

Cases referred to

Abdul Razak Ahmad v Mailis Bandaraya Johor Bahru [1995] 2 MLJ 287; [1995] 4 CLJ 339, HC (refd)
Chiow Thiam Guan v Superintendent of Pudu Prisons & the Government of Malaysia and Connected Appeals [1983] 2 MLJ 116, FC (refd)
Council of Civil Service Unions v Minister for the Civil Service [1984] 3 All ER 935, HL (refd)
Government of Malaysia v Lim Kit Siang [1988] 2 MLJ 12, SC (folld)
Jeyaretnam JB v The Attorney General [1990] 1 SLR 610; [1990] 3 CLJ Rep 643, HC (refd)
Juraimi bin Husin v Pardons Board, State of Pahang [2002] 4 MLJ 529, FC (refd)
Karpal Singh v Sultan of Selangor [1988] 1 MLJ 64 (refd)
Lee Ngan Fong & Ors v Gan Bo Tan & Ors [2011] MLJU 1493; [2011] 1 LNS 770, CA (refd)
Letitia Bosman v Public Prosecutor and other appeals (No 1) [2020] 5 MLJ 277; [2020] 8 CLJ 147, FC (refd)
Lim Cho Hock v Government of the State Of Perak, Menteri Besar, State of Perak and President, Municipality of Ipoh [1980] 2 MLJ 148 (refd)
Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (interveners) [2007] 5 MLJ 501, FC (refd)
Nik Hassan bin Nik Hussin v PP [1948] 1 MLJ 74 (folld)
Periasamy s/o Sinnappan & Anor v PP [1996] 2 MLJ 557, CA (refd)
PP v Soon Seng Sia Heng [1979] 2 MLJ 170, FC (refd)
Sim Kie Chon v Superintendent of Pudu Prison & Ors [1985] 2 MLJ 385, SC (refd)
Superintendent of Pudu Prisons & Ors v Sim Kie Chon [1986] 1 MLJ 494, SC (refd)
Tan Wei Hong (a minor suing through guardian ad litem and next friend Chuang Yin E) & Ors v Malaysia Airlines Bhd and other appeals [2019] 1 MLJ 59; [2018] 9 CLJ 425, FC (refd)
YAM Raja Dato' Seri Haji Izzuddin Iskandar Shah Ibni Almarhum Sultan Idris A'fifullah Shah v Dewan Negara Perak, Negeri Perak [2010] 2 CLJ 767, HC (refd)
Yong Vui Kong v Attorney General [2011] 1 SLR 1, HC (refd)

Legislation referred to

Federal Constitution arts 8, 25(1)(c), 42, 42(5), (9), 48(1), 181
Penal Code s 377B
Prisons Regulations 2000 reg 113
Rules of Court 2012 O 18 r 19, 19(1)

Appeal from: *Mohd Khairul Azam bin Abdul Aziz v Lembaga Pengampunan*

Wilayah Persekutuan & Anor [2020] MLJU 1691 (High Court, Kuala Lumpur)

Gopal Sri Ram (with Leela J Jesuthasan and Yasmeen Soh Sha-Nisse) (Chambers of Leela J) in Civil Appeal No W-01(IM)(NCvC)-479–09 of 2020 for the appellant.

Suzana bt Atan (with Narkunavathy a/p Sundareson) (Senior Federal Counsel, Attorney General's Chambers) in Civil Appeal No W-01(IM)(NCvC)-486–09 of 2020 for the appellant.

Mohamed Haniff bin Khatri Abdullah (with M Reza Hassan, Fatin Kamalia Mat Nawi and Muna Farhana Zainuddin) (Raja Riza & Assoc) in Civil Appeal Nos W-01(IM)(NCvC)-479–09 of 2020 and W-01(IM)(NCvC)-486–09 of 2020 for the respondent.

Lee Heng Cheong JCA:

INTRODUCTION

[1] The above two appeals are heard jointly as they relate to the same decision of the learned High Court judge. In the High Court, Mohd Khairul Azam bin Abdul Aziz, the plaintiff who is the respondent in both appeals here ('respondent') commenced an action by writ on 26 February 2020 against the second defendant, Datuk Seri Anwar bin Ibrahim who is the appellant in Appeal No W-01(IM)(NCVC)-479–09 of 2020 ('Appeal 479') ('first appellant') and the first defendant, the Pardons Board of Wilayah Persekutuan, which is which is the appellant in Appeal No W-01(IM)(NCVC)-486–09 of 2020 ('Appeal 486') ('the second appellant') seeking the following declarations:

(a) a declaration that the Pardons Board, the second appellant that convened and advised the Yang di-Pertuan Agong ('YDPA') on 16 May 2018 in respect of the full pardon granted to the first appellant ('pardon') was not properly constituted rendering the said sitting and advice given by the second appellant, the Pardons Board, null and void ab initio;

(b) a declaration that the pardon granted, is invalid, null and void; and

(c) alternatively, a declaration that the effect of the said pardon is limited to the sentencing only and does not set aside the conviction made against the first appellant.

[2] On 2 June 2020, the first appellant had filed an application to strike out the respondent's claim under O 18 r 19 of the Rules of Court 2012 ('the ROC') (encl 21) on the grounds that, inter alia:

(a) that the subject matter of this action is non-justiciable;

(b) that the composition of the first appellant is valid;

(c) that the respondent has no locus standi to bring the suit;

(d) that the discretion of YDPA is non-justiciable;

(e) that the court has no power to grant the relief sought for, the issue is hypothetical and academic in nature;

(f) that there is no cause of action; and

(g) that the claim is frivolous, vexatious and an abuse of the process of court.

[3] On 13 May 2020, the second appellant also filed an application to strike out the respondent's claim under O 18 r 19 of the ROC 2012 (encl 13) on the grounds that, inter alia:

(a) that the subject matter of respondent's claim is non-justiciable;

(b) that the respondent has no locus standi;

(c) that the respondent's claim is an abuse of court process;

(d) that the second appellant was validly constituted and the proceedings of the second appellant was carried out regularly and in accordance with the law; and

(e) further the granting of the pardon is the sole discretion of the YDPA.

[4] The learned High Court judge dismissed both striking out applications. Dissatisfied with the decisions of the learned High Court judge, both the appellants had filed separate appeals to the Court of Appeal.

[5] We heard both the two appeals on 21 September 2021 and we unanimously allowed the first and second appellants' appeals and our grounds are as follows.

[6] Parties shall be referred to their respective capacities before us.

BACKGROUND FACTS

[7] The first appellant was charged for an offence under s 377B of the Penal Code. He was acquitted by the High Court. However, on appeal by the prosecution, the first appellant was convicted and sentenced to a five years' imprisonment term. The Federal Court, on 10 February 2015, upheld the conviction and sentence.

[8] On 16 May 2018, the first appellant received the pardon which reads as follows. The 'Perintah Pengampunan Penuh dan Pembebasan Serta Merta' reads as follows:

MAKA, OLEH YANG DEMIKIAN, Beta Sultan Muhammad V, Kebawah Duli Yang Maha Mulia Seri Paduka Baginda Yang di Pertuan Agong XV, pada menjalankan kuasa yang terletak hak pada Beta oleh Perkara 42 Perlembagaan Persekutuan dan semua kuasa lain yang membolehkan bagi maksud itu ADALAH DENGAN INI MEMERINTAHKAN supaya DATO' SERI ANWAR bin IBRAHIM diberi *pengampunan sepenuhnya dan dianggap sebagai seorang yang tidak pernah melakukan apa-apa kesalahan serta diberi pembebasan serta merta*. (Emphasis added.)

THE FINDINGS OF THE LEARNED HIGH COURT JUDGE

[9] In dismissing the first and second appellants' said applications to strike out the respondent's claim, the learned High Court judge, inter alia, held as follows:

(a) that the respondent being a member of the public has a right to question the Attorney General ('AG') on the advice given by the second appellant resulting in the full pardon of the first appellant. Further, the respondent is not only an ordinary member of the public but also a lawyer and therefore has a higher right than an ordinary public to question the second appellant;

(b) that there was a legal delegation of power of the AG's powers authorised by art 42 cl (5) of the Federal Constitution;

(c) that even though the Minister of Federal Territories was not appointed on the date of proceedings of the second appellant at the material time, is of no consequence as the court accepts that under the 'Perintah Menteri-Menteri Kerajaan Persekutuan 2018 (PU(A) 125/2018) the Prime Minister ('PM') was the Minister in charge of the Federal Territory at the material time and the PM was present during the material proceedings. Thus, there is no merit in the respondent's contention that there is a defect in the composition of the second appellant on 16 May 2018;

(d) that the role of the AG is not only limited to be present during the proceedings of the second appellant and that an even more important role of the AG is to give a written opinion on the pardon. Article 42 cl (9) of the Federal Constitution states as follows:

> Before tendering their advice on any matter a Pardons Board shall consider any written opinion which the Attorney General may have delivered thereon.

(e) that the question that arises in this case is whether there was a written opinion given by the Attorney General in this case and whether the giving of written opinion be delegated;

(f) on matter of pardon where the YDPA acts on the advice of the Pardons Board or the second appellant here and AG, whether this power is justiciable;

(g) that the granting of pardon in Malaysia cannot be regarded as royal pardon unlike in country like England where the pardon by the Monarch is not subject to any restriction and given as a royal prerogative;

(h) that the granting of pardon cannot be ruled as not justiciable just because it is exercised by the August and High Office of the YDPA. It will be a dereliction of duty on the part of the court and a breach of the Federal Constitution to rule so. In short, this court rules the granting of pardon by the YDPA is definitely justiciable;

(i) that this suit has raised a number of triable issues, the most significant being the validity and correctness of the advice given by the second appellant resulting in the granting of the pardon;

(j) that the court is empowered to determine whether the advice given justified the pardon and an important reason for doing so is to prevent a breach of art 8 of the Federal Constitution which stipulates equality before the law;

(k) that there is an important issue whether the Executive Branch of the Government can encroach into the powers of the Judiciary, by setting aside a conviction of an accused who has been convicted after the full due process of the law;

(l) that there are triable issues and live issues that need to be determined and cannot be regarded as merely academic or hypothetical issues. Further the first appellant has not completed his full term of imprisonment for which he was sentenced with and therefore the court is still in a position to grant the declarations sought by the respondent;

(m) that the normal mode of challenging the exercise of executive powers is by way of judicial review. However, the courts have ruled in a number of cases that in a case where the performance of public duty affect private rights the actions can be begun by a writ;

(n) that the appropriate mode of initiating this proceeding by way of oral evidence of witnesses who can be subjected to cross-examination;

(o) that the respondent has a locus standi to file this claim by way of writ to obtain a declaration on the validity of the full pardon granted to the first appellant. There are triable issues which needs determination of court after a full trial; and

(p) that this is not a case which can be summarily dismissed under O 18 r 19 of the ROC 2012. A full trial with witnesses is necessary for the determination of the issues emanating from this suit.

THE FIRST APPELLANT'S CONTENTIONS

[10] Before us, the first appellant contended as follows:

(a) whether the clemency process and the royal prerogative of mercy are justiciable?

(b) whether the respondent has the necessary locus standi to bring and maintain the action?

(c) whether the respondent has a cause of action and if so, whether action by writ was the correct mode?

(d) whether the respondent who has no interest in the subject matter of the declarations sought, is entitled to seek the relief claimed? and

(e) whether the respondent's action is an abuse of process and ought to be struck out?

THE SECOND APPELLANT'S CONTENTIONS

[11] The second appellant in turn contended that the respondent's action is frivolous and vexatious and an abuse of the court's process based on the following grounds:

(a) that the second appellant was lawfully and properly constituted in accordance with art 42 of the Federal Constitution;

(b) that the sitting of the second appellant held on 16 May 2018 to deliberate on the first appellant's pardon was carried out in accordance with art 42 of the Federal Constitution; and

(c) that the pardon granted pursuant to art 42 of the Federal Constitution is the prerogative of the YDPA.

THE RESPONDENT'S CONTENTIONS

[12] The respondent, before us, in directly challenging the pardon granted to the first appellant, contends as follows:

(a) that the second appellant, being the Pardons Board was not properly established and thus, the advice rendered to the YDPA is defective and void;

(b) that the YDPA's action is based on the wrong advice by the second appellant to the YDPA. The respondent contended that the advice is wrong because the Federal Constitution does not provide for a full pardon, in that a pardon cannot set aside a conviction;

(c) that he has an express and implied cause of action for constitutional rights by virtue of being a Malaysian citizen;

(d) that the composition of the second appellant is not proper;

(e) that there is an issue of the constitutionality/legality of the pardon given to the first appellant;

(f) that the subject matter of the respondent's action is justiciable; and

(g) that the respondent has locus standi to sue.

DUTY OF AN APPELLATE COURT

[13] The law on striking out under O 18 r 19(1) of the ROC 2012 is clear. A case may only be struck out by the court if it is satisfied that the claim is on the face of it 'obviously unsustainable'.

[14] In *Tan Wei Hong (a minor suing through guardian ad litem and next friend Chuang Yin E) & Ors v Malaysia Airlines Bhd and other appeals* [2019] 1 MLJ 59; [2018] 9 CLJ 425, the Federal Court at pp 67–68, 77 and 79 (MLJ) at paras 16–17, 19, 53 and 63–64, held, inter alia, that:

> [16] The principle for striking out of pleadings pursuant to O 18 r 19 of the ROC is well settled. *It is applicable only in a plain and obvious case or where a claim is, on the face of it, obviously unsustainable* (see: *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7 SC *Hubbuck & Sons Ltd v Wilkinson, Heywood & Giard Ltd* [1899] 1 QB 86 *Attorney General of the Duchy of Lancaster v London and North Western Railway Company* [1892] 3 Ch 274).
>
> [17] The tests for striking out application under O 18 r 19 of the ROC, *as adopted by the Supreme Court in Bandar Builder* are, inter alia, as follows:
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> (a) *it is only in plain and obvious cases that recourse should be had to the summary process under the rule*;
>
> (b) *this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it obviously unsustainable; it cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence;*
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> (c) *if there is a point of law which requires serious discussion, an objection should be taken on the pleadings* and the point set down for argument under O 33 r 3 of the ROC; and
>
> (d) the court must be satisfied that *there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.*
>
> ...

A [19] The basic test for striking out as laid down by the Supreme Court in *Bandar Builder* is that *the claim on the face of it must be 'obviously unsustainable'*. The stress is not only on the word 'unsustainable' but also on the word 'obviously', ie, *the degree of unsustainability must appear on the face of the statement of claim without having to go into a lengthy and mature consideration in detail. If one has to go into a lengthy* B *detailed argument and mature consideration of the issues of law and/or fact, then the matter is not appropriate to be struck out summarily. It must be determined at the trial.*

...

[53] The Court of Appeal concluded that the factual issues, particularly regarding C the extent of the statutory duties of the third defendant, the issue of whether the third defendant had carried out his duties in the circumstances of the case and the applicability of the doctrine of res ipsa loquitor as pleaded by the plaintiffs, *required close examination by the court and could only be resolved after careful examination of the evidence from both sides which the court could not embark upon at the preliminary stage of a striking out application. These issues were triable issues that needed to be decided and* D *determined at trial.*

...

[63] We find support for the above proposition in the words of Lord Browne-Wilkinson in the case of *Barrett v Enfield Borough Council* who had E expressed his view that '... *in an area of the law which was uncertain and developing (such as the circumstances in which a person can be held liable in negligence for the exercise of a statutory duty or power) it is not normally appropriate to strike out.* In my judgment, it is of great importance that such development should be on the basis of actual facts found at trial not on hypothetical facts assumed (possibly wrongly) to be true for the purpose of the strike out'.

F [64] *We are also of the view that in dealing with an application for striking out, the court must exercise great care and caution, bearing in mind that the court must not drive away any litigant however weak his case may be from the seat of justice* (see: *Lee Nyan Choi v Voon Moon* [1979] 2 MLJ 28; [1978] 1 LNS 94). On the face of the pleadings against the third defendant, the plaintiffs' claim is not obviously unsustainable. G *There are triable issues that need to be fully argued at trial. This is a case where the court is not in a position to embark on a minute examination of the documents and the facts of the case at this preliminary stage of striking out application. That is solely reserved for the trial judge.*

H OUR ANALYSIS AND CONCLUSION

[15] Bearing the above guidance and principles in mind, we will proceed to consider the two appeals.

I *Any cause of action?*

[16] The first and second appellants contended that the respondent must have a cause of action before he can claim a relief. Guidance can be found in *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12, where the court

held that a cause of action was as follows:

> a statement of facts alleging that the plaintiff's right either at law or by statute, has, in some way or another, been adversely affected or prejudiced by the act of the defendant in an action. Lord Diplock in *Letang v Cooper* at p 242 defined 'a cause of action' to mean a factual situation, the existence of which entitles one person to obtain from the court a remedy against another person. In my view the factual situation spoken of by Lord Diplock must consist of a statement alleging that, first, the respondent/plaintiff has a right either at law or by statute and that, secondly, such right has been affected or prejudicated by the appellant/defendant's act.

[17] Further, the respondent must have some interest in the subject matter of the declarations, ie the pardon granted in this case, or some rights against the appellants. In this case, we are of the considered opinion that the respondent has none.

[18] We noted that the learned High Court judge acknowledged that the respondent had no cause of action against the first appellant. Similarly, we are of the considered view that the respondent has no cause of action against the second appellant.

[19] In this case, the respondent's claim does not disclose a cause of action against the first appellant and/or the second appellant, the Pardons Board. The respondent has not pleaded any infringement of private or public rights or interest or special injury resulting from the pardon granted to the first appellant. The respondent is clearly a busy body, a trouble maker and is not entitled to the declarations sought. Simply being a Malaysian citizen and a lawyer does not accord him the requisite right to bring this frivolous suit. It is clearly an abuse of process and ought to have been struck out.

[20] In *Government of Malaysia v Lim Kit Siang*, where the respondent was a complete stranger and had no interest nor had he been deprived of his rights, the Supreme Court held that his suit was not maintainable and he was not entitled to the remedy of declaration.

Powers of clemency of YDPA

[21] The respondent contended that the powers of the YDPA to pardon is only in respect of sentence and not conviction of the first appellant. However, no authority was adduced by the respondent to support that contention. We are of the considered view that there is nothing in art 42 of the Federal Constitution which curtails or limits the powers of the YDPA to grant the pardon to the first appellant. If the intention was to limit it to sentence only, it should have been clearly stated in the Federal Constitution. It is not for the court to add any words. We find that the plain words of the relevant article of

the Federal Constitution do not exclude the granting of a pardon in respect of a conviction.

[22] Our perusal of art 42 of the Federal Constitution showed that the powers of mercy and clemency of the YDPA are extensive and encompasses both conviction and sentence.

[23] Under reg 113 of the Prisons Regulations 2000, a person who has been convicted has the right to petition the YDPA for a pardon against conviction and sentence. Further, art 48(1) and art 25(1)(c) of the Federal Constitution refer to a 'free pardon'.

[24] In the Singapore case of *Jeyaretnam JB v The Attorney General* [1990] 1 SLR 610; [1990] 3 CLJ Rep 643, the court at p 654b held as follows:

> Clearly whether a conviction is subsequently considered good or bad, it remains a conviction unless it is removed by a free pardon from the President. Only such a pardon can remove the disqualification.

[25] Further guidance can be found in *Nik Hassan bin Nik Hussin v Public Prosecutor* [1948] 1 MLJ 74 where two out of five defendants appealed and their convictions quashed, recommendation was made to the Governor to grant the remaining three, a free pardon.

Locus standi

[26] We are in agreement with this contention of the appellants that the learned High Court judge erred in finding that the respondent had the necessary locus standi merely by virtue of being a member of the public and a lawyer. The learned High Court judge erred in failing to apply the correct test in determining the issue of locus standi.

[27] In determining whether a particular litigant has the requisite locus standi, the test to be applied was stated in *Government of Malaysia v Lim Kit Siang*. This is what Abdul Hamid Omar CJ held at p 27:

> A litigant is said to have locus standi, in effect standing to sue in a court of law, if that court recognises his or her ability to institute and maintain proceedings before it. The question of standing is thus separate and distinct from questions of substantive merits and the legal capacity of the plaintiff. It follows, therefore, that a litigant may lack standing to bring a case which would succeed if brought by the right litigant.
>
> *Put in a nutshell, the law of standing to sue has two fundamental rules. First, apart from certain cases in which standing to sue is in the discretion of the court, the plaintiff must possess an interest in the issues raised in the proceedings. Second, where the private plaintiff relies on an interest in the enforcement of a public right and not a private right,*

standing will be denied unless the Attorney General consents to a relator action, or the plaintiff can demonstrate some special interest beyond that possessed by the public generally. (Emphasis added.)

[28] We are of the considered view that the clemency process and the granting of the pardon to the first appellant does not in way or manner affect the respondent's personal or legal or any rights or interests. Thus, the respondent has no standing or right to question the clemency process or the advice given to the YDPA or the granting of the pardon to the first appellant (see *Karpal Singh v Sultan of Selangor* [1988] 1 MLJ 64).

[29] The respondent, being an advocate and solicitor does not enjoy any higher right or privileges than ordinary people in this case. The learned High Court judge clearly erred and misdirected himself for such a finding. There is nothing in the Federal Constitution which imposes a duty on the second appellant or the YDPA to consult the respondent or accept his views.

[30] For the respondent to found an action such as this, he must demonstrate that he has suffered some special damage by the granting of the pardon and that he has a genuine private interest to protect (see: *Abdul Razak Ahmad v Mailis Bandaraya Johor Bahru* [1995] 2 MLJ 287; [1995] 4 CLJ 339) and that he will benefit from the declarations (see *Lee Ngan Fong & Ors v Gan Bo Tan & Ors* [2011] MLJU 1493; [2011] 1 LNS 770). From the evidence adduced, the respondent in this case has failed wholly in this respect. Accordingly, he has no locus standi to challenge the pardon granted to the first appellant. It is the first appellant's personal rights and liberties that will be infringed if the declarations are granted.

Advice of the Pardons Board

[31] The learned High Court judge held that there was an issue to be tried as to the correctness of advice given by the second appellant and whether there was a written opinion given by the AG. We find that the learned High Court judge clearly erred and misdirected himself on these issues as follows:

(a) that the learned High Court judge blatantly ignored the pertinent and binding decisions of the Federal Court and Supreme Court that held that it is not open for the court to examine the advice of the Pardons Board, the matter being non-justiciable. The courts here, and England have consistently held that there shall be no challenge to the decision-making process leading to a decision by the YDPA on such matters;

(b) in *Superintendent of Pudu Prisons & Ors v Sim Kie Chon* [1986] 1 MLJ 494 at p 498 the court held as follows:

> If any court were to accede to the contention advanced on behalf of the

respondent on the lines indicated then it would in effect be countenancing the respondent's participation in the exercise of Executive and prerogative power and virtually reactivating a concluded trial. *It follows sequentially that if it is open to the court to examine the advice of the Pardons Board there would then in effect be an extra-curial retrial and endless re-ventilation of every convicts case.* (Emphasis added.)

(c) in *Juraimi bin Husin v Pardons Board, State of Pahang* [2002] 4 MLJ 529, the Federal Court held:

> *The effect of making the decision making process justiciable would have the same effect as having the decision itself justiciable. Consequently, any attempt to make the decision making process justiciable would indirectly make the decision itself justiciable.* Accordingly the decision making process of the decision by the Sultan of Pahang under art 15 of the Laws of the Constitution of Pahang read with art 42 of the Federal Constitution, was not justiciable. (Emphasis added.)

(d) further, in *Karpal Singh v Sultan of Selangor* [1988] 1 MLJ 64, an originating summons was filed relating to an issue concerning the process of clemency, the court held that it was not mandatory for the YDPA to act on the advice of the Pardons Board. See p 67B-G of the grounds of judgment, where the court held:

> *Clause (9) of art 42 cited by Mr Karpal Singh does not make it mandatory on the ruler to act on the advice.* It only makes it obligatory on the part of the Pardons Board as *constituted under clause (5) of art 42 constituting of special persons to consider* a written opinion which the Attorney General may have delivered thereon before tendering advice. (Emphasis added.)

(e) we noted that the respondent did not adduce evidence of the advice given by the second appellant to YDPA and we can safely assume that the respondent has no knowledge of the advice. Thus, there is no basis for the respondent to contend that such advice is wrong.

[32] Across the straits, in Singapore, where the power of the President to grant clemency was exercised on the advice of the cabinet, the court there held that the clemency process was not justiciable. *Yong Vui Kong v Attorney General* [2011] 1 SLR 1 at paras 82 and 84, where the court held that the power to grant pardons was an Executive power which was highly discretionary in nature and this excluded any duty to act judicially. Further, the clemency process was a highly private process and the applicant had no right to see the materials which would be before the cabinet when it advised the President.

[33] Article 42(9) of the Federal Constitution provides:

> Before tendering their advice on any matters, *a Pardons Board shall consider any written opinion which the Attorney General may have delivered thereon*. (Emphasis added.)

[34] Thus, art 42(9) of the Federal Constitution does not make it mandatory for the AG to render a written opinion. As such, we are of the firm view that the learned High Court judge assumed erroneously that there was no written opinion and that it did not support the pardon. There is no basis for this erroneous assumption and in any event, that is not the respondent's pleaded case. Thus, it is not an issue to be tried.

Non-justiciable?

[35] In seeking a declaration that the pardon granted by the YDPA to the first appellant is void, the respondent is mounting a challenge against the powers of clemency of the YDPA and is moving the court to review the exercise of the prerogative powers of the YDPA. The power of pardon has been accorded to the YDPA by art 42 of the Federal Constitution which reads:

> Article 42
>
> (1) *The Yang di-Pertuan Agong has the power to grant pardons, reprieves and respites* in respect of all offences which have been tried by court-martial and all offences committed in the Federal Territories of Kuala Lumpur, Labuan and Putrajaya and the Ruler or Yang di-Pertua Negeri of a State has the power to grant pardons, reprieves and respites in respect of all other offences committed in his State. (Emphasis added.)

[36] Further, art 181 of the Federal Constitution provides:

> Subject to the provisions of this Constitution, the sovereignty, prerogatives, powers and jurisdiction of the Rulers ... as hitherto had and enjoyed shall remain unaffected.

[37] The long and consistent established position of the law in Malaysia is that the prerogative power of the YDPA under art 42 of the Federal Constitution is non-justiciable.

[38] In *Public Prosecutor v Soon Seng Sia Heng* [1979] 2 MLJ 170, the Federal Court held that the court had no jurisdiction to confirm or vary the decision of the YDPA. Suffian LP stated at p 171F-G of the Report as follows:

> *When considering whether to confirm, commute, remit or pardon, His Majesty does not sit as a court, is entitled to take into consideration matters which the courts bound by law of evidence cannot take into account and decides each case on grounds of public policy; such decisions are solely for the Executive. We cannot confirm or vary them; we have no jurisdiction to do so. The royal prerogative of mercy, as recognised by its inclusion in Chapter 3 of Part IV of the Constitution,* is an Executive power — as in *Jamaica Hinds v The Queen.* (Emphasis added.)

[39] In *Chiow Thiam Guan v Superintendent of Pudu Prisons & the*

Government of Malaysia and Connected Appeals [1983] 2 MLJ 116, the Federal Court held that:

> The courts are without jurisdiction to deal with this sort of application for the reason that mercy is not the subject of legal rights.

[40] Further, in *Sim Kie Chon v Superintendent of Pudu Prisons & Ors*, the Supreme Court, inter alia, held:

> A decision made pursuant to an exercise of royal prerogative of mercy cannot be varied or confirmed by the courts there being no jurisdiction to do so.

[41] At p 387 of the same case, the Supreme Court said:

> In our judgment proceedings in court aimed at questioning the propriety or otherwise of such a decision are therefore not justiciable ... *It is our considered view that the power of mercy is a high prerogative exercisable by the Yang Dipertuan Agong or the Ruler of a State or the Yang di-Pertuan Negeri, as the case may be, who acts with the greatest conscience and care and without fear of influence from any quarter.* (Emphasis added.)

[42] Further, in *Superintendent of Pudu Prisons v Sim Kie Chon*, the Supreme Court held:

> The power of pardon or otherwise to mete out clemency is *an Executive power and in the Federal Constitution the royal prerogative of mercy* is expressly preserved by art 42 of the Constitution and is recognised by its inclusion on Chapter 3 of Part IV of the Constitution as an Executive power. *When the Constitution has empowered the nation's highest Executive as the repository of clemency power, the court cannot intervene and judicial review is excluded by implication.* (Emphasis added.)

[43] Similarly, in *Juraimi bin Husin v Pardons Board State of Pahang*, the Federal Court held that the royal prerogative of mercy and the decision-making process was not amenable to judicial process.

[44] Further support can be found in the English case of *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935, where at p 956, per L Roskill said as follows:

> Prerogative powers such as those relating to the prerogative of mercy ... are not, I think, susceptible to judicial review because their nature and subject matter is such as *not to be amenable to the judicial process.*

[45] The case of *Sim Kie Chon v Superintendent of Pudu Prisons* was cited with approval by the Federal Court in the recent case of *Letitia Bosman v Public Prosecutor and other appeals (No 1)* [2020] 5 MLJ 277; [2020] 8 CLJ 147 at para 130, where the court stated:

The power of pardon provided for under art 42 of the Federal Constitution is, however, a prerogative of mercy exclusively vested in the YDPA or Ruler of any State in Malaysia.

[46] It is clear in his grounds of judgment that the learned High Court judge in this case, blatantly ignored binding precedents when he held that the granting of pardon in Malaysia was not a royal prerogative and that it is definitely justiciable. We are of the further view that the learned High Court judge was clearly wrong to ignore the doctrine of stare decisis. Further, there was no reason and basis for him, to depart from the long line of established binding precedents.

[47] The learned High Court judge was bound to follow the judgments of the Federal Court and Supreme Court, whether he agreed with them or not (see: (a) *Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (interveners)* [2007] 5 MLJ 501; and (b) *Periasamy s/o Sinnappan & Anor v Public Prosecutor* [1996] 2 MLJ 557 at p 582 (C-E).

[48] The power to grant pardons can only be exercised by the YDPA personally and exclusively and such exercise is not justiciable. There is no basis for the respondent in this case to impugn the YDPA's exercise of his exclusive power to grant the pardon. See: *YAM Raja Dato' Seri Haji Izzuddin Iskandar Shah Ibni Almarhum Sultan Idris A'fifullah Shah v Dewan Negara Perak, Negeri Perak* [2010] 2 CLJ 767.

[49] The respondent sought to have the pardon granted by the YDPA to the first appellant to be declared void. However, the respondent has failed to plead any averments in the respondent's pleading or affidavit nor was any evidence adduced that in granting the pardon to the first appellant, the YDPA acted beyond his statutory powers or in bad faith. Thus, we are of the considered opinion that there was no basis to impugn the pardon granted and no reasons for the learned High Court judge to make the findings, he did.

[50] Further, even if the respondent had the necessary locus standi and the matter was justiciable, the correct mode of challenge would have been by judicial review within the three month time frame provided under the Rules, and not by writ.

[51] In *Lim Cho Hock v Government of the State of Perak, Menteri Besar, State of Perak and President, Municipality of Ipoh* [1980] 2 MLJ 148, the court held that:

The court's power to make declaratory judgments is confined to matters justiciable

in the courts, and the binding declarations which it could make under O 15 r 16 of the Rules of the High Court 1980 are limited to legal or equitable rights and do not extend to moral, social and political matters.

CONCLUSION

[52] In conclusion, we are of the considered opinion that for the court to even consider granting declaratory relief, the following requirements must be satisfied namely:

(a) the court must have the jurisdiction and power to grant the remedy;

(b) that the matter must be justiciable in court; and

(c) the plaintiff must have locus standi to bring the suit and there must be a real controversy for the court to resolve.

[53] In the light of our above findings after having considered the findings and reasons given by the learned High Court judge dismissing the striking out applications of the first and second appellants, we are of the considered opinion that the learned High Court judge made serious errors and misdirections in material findings of the law and facts which warranted appellate intervention.

[54] Further, in the light of our above findings, we are of the considered view that there are no serious triable issues to be tried in this case and that the respondent's claim is frivolous and an abuse of the process of court.

[55] In the premises, we are of the respectful view that there are merits in the first and second appellants' appeals. The prerogative of mercy can only be exercised by the YDPA and not caught within the supervisory jurisdiction of the courts. Thus, the respondent's suit is clearly unmaintainable and an abuse of process. In the premises, we unanimously allow the appeals with no order as to costs.

[56] The order of the High Court dated 21 September 2020 is set aside and that the respondent's writ and amended statement of claim be struck out.

Appeals allowed.

Reported by Nabilah Syahida Abdullah Salleh